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No. 86-1155

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL., PETITIONERS

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Animal Lovers Volunteer Ass'n v. *Weinberger*, 765 F.2d 937 (9th Cir. 1985) 6
Animal Welfare Institute v. *Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978) 7
Benton Franklin Riverfront Trailway & Bridge Committee v. *Lewis*, 701 F.2d 784 (9th Cir. 1983) 7
Carnegie-Mellon University v. *Cohill*, cert. granted, No. 86-1021 (Feb. 23, 1987) 5
Cook v. *Weber*, 698 F.2d 907 (7th Cir. 1983) 5
Fox v. *Custis*, 712 F.2d 84 (4th Cir. 1983) 4
Naylor v. *Case & McGrath, Inc.*, 585 F2d 557 (2d Cir. 1978) 5
Pacemaker Diagnostic Clinic of America, Inc. v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.), cert. denied, 469 U.S. 824 (1984) 8
Pacific Legal Foundation v. *Goyan*, 664 F.2d 1221 (4th Cir. 1981) 7
Romulus Community School, In re, 729 F.2d 431 (6th Cir. 1984) 4-5
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 3, 6
Swett v. *Schenk*, 792 F.2d 1447 (9th Cir. 1986) 5
Taub v. *State*, 296 Md. 439, 463 A.2d 819 (1983) 2
Thomas v. *Arn*, No. 84-5630 (Dec. 4, 1985) 8
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 4, 5
United States v. *Richardson*, 418 U.S. 166 (1974) 3

Statutes:

Animal Welfare Act, 7 U.S.C. (& Supp. III) 2131 *et seq.* 4
28 U.S.C. 636(b) 8
28 U.S.C. 636(c) 8
28 U.S.C. 1441(a) 2
28 U.S.C. 1441(c) 5, 6
28 U.S.C. 1447(c) 5

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Petitioners challenge the court of appeals' holding that they lack standing to prevent the return of certain monkeys to a laboratory that is conducting medical research pursuant to a grant from the National Institutes of Health.

1. Petitioners are certain individuals and organizations professing concern for the welfare of animals. In 1981, they complained to authorities of the State of Maryland that Dr. Edward Taub, a principal

of respondent Institute for Behavioral Research (IBR), was conducting medical experiments on and failing properly to care for certain monkeys. Pet. App. 7-10, 35-37. Those authorities then obtained a warrant to search IBR's laboratory and seized seventeen monkeys that they found there. Although Dr. Taub explained that his medical experiments were being funded by the National Institutes of Health (NIH), the Maryland authorities charged that he was violating the state's cruelty-to-animals statute by his treatment of the monkeys. *Id.* at 10-11. A Maryland court ordered that the monkeys be placed in custody pending Dr. Taub's prosecution (*id.* at 11).

2. Dr. Taub was subsequently acquitted of the criminal violations with which he was charged (Pet. App. 11).[1] Fearful that the custody order would therefore expire, petitioners commenced this civil action in the Circuit Court for Montgomery County, Maryland, seeking to prevent the monkeys from being returned to IBR (*id.* at 11-13). NIH promptly removed the case to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. 1441(a), and, together with IBR, moved that the case be dismissed (Pet. App. 13). The district court assigned the case to a federal magistrate and, in January 1985, the magistrate determined that petitioners lacked standing to obtain the injunctive relief

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[1] Dr. Taub was initially acquitted on eleven of seventeen counts (Pet. App. 11). On appeal, the Court of Appeals of Maryland overturned the six counts on which he had been convicted, holding that the Maryland cruelty-to-animals statute does not apply to institutions conducting medical research pursuant to federal medical research programs. See *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

that they requested (*id.* at 16; see also *id.* at 35-38). After conducting a "*de novo* review of the Magistrate's Report and Recommendation," the district court adopted the magistrate's report and dismissed the action (*id.* at 59-60).

3. The court of appeals unanimously affirmed (Pet. App. 1-34). It found that petitioners had not alleged sufficient injury-in-fact to give them " 'a personal stake in the outcome of the controversy' " (*id.* at 19 (citation omitted)). The court rejected petitioners' claim of "taxpayer standing," reasoning that *United States* v. *Richardson*, 418 U.S. 166 (1974), foreclosed their argument "that their tax payments entitle them to ensure that the law is respected by NIH, a federal agency, and by IBR, a recipient of federal funds" (Pet. App. 18). The court also rejected petitioners' argument that they had standing by virtue of the fact that "they contributed to the maintenance of the monkeys" while the monkeys were in custody, stating that petitioners' "voluntary offer to help the Maryland authorities" did not give them "any interest in the monkeys, who remained the property of IBR and in the legal custody of [the state authority]" (*id.* at 18-19). The court further held that *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), foreclosed petitioners' attempt to predicate standing on their "asserted commitment to the humane treatment of animals" (Pet. App. 19-21), finding that petitioners could not claim standing based on the disruption of "their personal relationship with these monkeys" since petitioners "ha[d] been with the monkeys primarily because of this litigation" and would no longer be entitled even to "see the monkeys in the IBR laboratory if the defendants satisfied all

requirements of care" (*id.* at 21, 22).[2] Finally, the court sustained the dismissal of petitioners' state law claims (*id.* at 33-34), holding that, under "the doctrine of pendent jurisdiction[,] * * * state claims should usually be dismissed if the federal claims have been dismissed before trial." "Without a justiciable case or controversy," the court held, "federal courts cannot address claims of state law." *Id.* at 34.

4. The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioners err in suggesting (Pet. 54-56) that the court below was obligated to direct the district court either to address the state law claims or to remand those claims to the state court. This Court has ruled that, when federal claims are dismissed before trial, pendent "state claims should be dismissed as well" (*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted)). Moreover, the courts of appeals are unanimous in holding that pendent state claims need not be remanded to state courts where, as here, they arise out of the same core of facts as the federal claims that are dismissed. See *Fox* v *Custis*, 712 F.2d 84, 89 n.4 (4th Cir. 1983); *In re Romulus Community Schools*, 729 F.2d 431, 436 (6th Cir. 1984).[3]

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[2] As an alternative holding, the court also ruled that, even if petitioners had standing, the federal statute from which they sought to infer a private right of action—the Animal Welfare Act, 7 U.S.C. (& Supp. III) 2131 *et seq.*—did not "authorize[] their right to seek relief" (Pet. App. 23). The court determined that the "statutory design * * * [is] inconsistent with the private right of action that [petitioners] assert" (*id.* at 24).

[3] Contrary to petitioners' assertion (Pet. 55), no court of appeals has held that state claims must be remanded when

Indeed, in *Carnegie-Mellon University* v. *Cohill*, cert. granted, No. 86-1021 (Feb. 23, 1987), this Court will determine whether a district court may *ever* remand pendent state law claims for a reason not set forth in 28 U.S.C. 1447(c). That Section provides that a district court "shall remand the case" to state court if it appears that the case was removed to federal court "improvidently and without jurisdiction." Petitioners do not and cannot claim that the removal of this case to federal court was improvident or without jurisdiction, since petitioners' complaint asserted federal law claims against NIH, a federal agency. See *Cook* v. *Weber*, 698 F.2d 907, 909 (7th Cir. 1983) (dismissal without prejudice of state claims is the *only* permissible remedy where the condition set forth in Section 1447(c) is not met). Therefore, petitioners' contention that the district court *must* remand a properly removed case to state court is completely unfounded.[4]

Finally, contrary to petitioners' assertion (Pet. 7), 28 U.S.C. 1441(c) does not require that their state law claims be remanded. That Section pertains

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federal claims are dismissed before trial. The gravamen of *Naylor* v. *Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978), and *Swett* v. *Schenk*, 792 F.2d 1447 (9th Cir. 1986), is that district courts *may* remand pendent state claims, not that they must do so.

[4] We note that this case need not be held pending the resolution of *Carnegie-Mellon University*. As noted in the text, that case concerns whether a court *may* remand a removed case to state court for reasons other than those set forth in 28 U.S.C. 1447(c). Here, by contrast, petitioners contend that a district court *must* remand a case to a state court whether 28 U.S.C. 1447(c) applies or not. This Court has already rejected that contention. See *United Mine Workers* v. *Gibbs*, 383 U.S. at 726 (instructing that pendent state claims be dismissed).

only to state law claims that are "separate and independent" from the federal claims that initially led to the removal. Petitioners' state law claims—which arose out of the same core set of facts as their federal claims—are not such "separate and independent" claims. And, in any event, Section 1441(c) simply *authorizes* a district court to remand such separate and independent state law claims; it does not *mandate* that the district court do so.

b. Petitioners likewise err in suggesting (Pet. 56-62) that, because they have had "specific contacts" with the monkeys at issue in this case, they have standing to invoke the jurisdiction of the district court in their effort to assert control over those animals. As the court below noted (Pet. App. 20-22), this Court has held that a mere abstract interest in the preservation of another person's property—even the government's property—does not provide a litigant with standing to sue in federal court. See *Sierra Club* v. *Morton*, 405 U.S. 727, 735 n.8 (1972). To be sure, the Court has intimated that, where an individual actually has a right of access to and visits a park or other public facility, he arguably may invoke a federal court's jurisdiction to challenge acts that disturb the facility's physical well-being (*ibid.*). But the monkeys are the property of IBR and, apart from the temporary change in custody attributable to the now-concluded state criminal proceedings, petitioners have no right of access to visit them. Thus, petitioners' alleged "contacts" with the monkeys are too ephemeral and transitory to provide them with standing. Accord, *Animal Lovers Volunteer Ass'n* v. *Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985) (environmental group lacked standing to challenge treat-

ment of animals in federal enclave to which there was no public access).[5]

In any event, petitioners seem to accept (Pet. 57, 60) the legal proposition that a high degree of regular personal contact between the property sought to be protected and the person attempting to sue is necessary to confer standing. The question whether the quantum of personal contact involved here was sufficient to confer standing is essentially a factual question unworthy of this Court's review.

c. Petitioners next argue (Pet. 62-63) that NIH has greater "remedial rights or authority" to protect the monkeys than it exercised in this case. But there is no question here concerning the standing of NIH to exercise any rights that it may have. Rather, the question concerns the right of petitioners to invoke the jurisdiction of a federal court to exercise *their* alleged rights. Petitioners' argument is thus beside the point.

d. Finally, petitioners err in claiming (Pet. 63-64) that the application of the Federal Magistrate Act of 1979 in this case conflicts with that statute's

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[5] The cases that petitioners cite (Pet. 59-60) do not hold to the contrary. In *Benton Franklin Riverfront Trailway & Bridge Committee* v. *Lewis*, 701 F.2d 784 (9th Cir. 1983), the plaintiffs had a right of access to and had visited the public bridge that was about to be demolished. In *Animal Welfare Institute* v. *Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the plaintiffs had access to and had visited the seals that they sought to save. And in *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221 (4th Cir. 1981), the plaintiffs were held to have a financial interest in the subsidies provided to competing interest groups. Thus, none of the cases are similar to the situation here, where litigants without a right of access are attempting to base standing on their general aesthetic interest in the property in issue.

application in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). In *Pacemaker*, the Ninth Circuit held that 28 U.S.C. 636(c), the provision permitting consensual referral to magistrates, is constitutional. See 725 F.2d at 546. Here, the case was referred to a magistrate under 28 U.S.C. 636(b), the statute's mandatory referral provision. Since the *Pacemaker* court and the court below both *upheld* referrals to magistrates, and since the *Pacemaker* decision in any event involved a different statutory provision, there is plainly no conflict between the two decisions. The *Pacemaker* court did note in dicta that 28 U.S.C. 636(b) is constitutional because it provides for a "*de novo* determination" by the district court. See 725 F.2d at 546. But that notation is completely consistent with the disposition of the district court here, where the case was dismissed only after the court conducted a "*de novo* review of the Magistrate's Report and Recommendation" (Pet. App. 59-60).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6] Petitioners' argument (Pet. 64) that the district court's conduct of "'*de novo* review'" conflicts with *Pacemaker*'s requirement that the district court make a "*de novo* 'determination'" is frivolous. Those terms are interchangeable. See *Pacemaker*, 725 F.2d at 546; *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 13-14.

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